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No. 03-1693

In the
Supreme Court of the United States

McCreary County, *et al.*
Petitioners,

v.

ACLU of Kentucky, *et al.*,
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

Brief of Baptist Joint Committee, American Jewish Committee, American Jewish Congress, and The Interfaith Alliance Foundation, as Amici Curiae in Support of Respondents

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QUESTION PRESENTED

Whether government may display a sacred text if it surrounds that text with patriotic texts and makes conclusory assertions that the sacred text has secular significance parallel to that of the patriotic texts.

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INTEREST OF THE AMICI

The amici joining in this brief are Christian, Jewish, and interfaith religious organizations. These amici are concerned about the religious liberty of all persons, *and* about government undermining true religious faith by using religion for political purposes. This case is one of many in which government displays a sacred text, and then distorts that text and diminishes its religious significance by claiming that the text is primarily secular in purpose and effect.[1]

The Baptist Joint Committee is a religious liberty organization serving fourteen cooperating Baptist conventions and conferences in the United States. The BJC deals exclusively with religious liberty and church-state separation issues and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to religious liberty for all Americans.

The American Jewish Committee, a national organization of over 150,000 members and supporters and 33 regional chapters, was founded in 1906 to protect the civil and religious rights of Jews. A staunch defender of church-state separation as the surest guarantor of religious liberty for all Americans, the Committee filed an amicus brief opposing mandatory display of the Ten Commandments in Kentucky public schools in *Stone v. Graham*, 449 U.S. 39 (1980), where the Court recognized the religious nature of the Ten Commandments, stating that "The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." *Id.* at 41. The Committee also recently filed an amicus brief in

[1] This brief was prepared entirely by counsel for amici. No person other than amici and their counsel made any financial contribution to the preparation or submission of this brief. This brief is filed with consent of all parties. Respondents' consent is on file with the Clerk; Petitioners' consent is submitted with the brief.

Van Orden v. Perry, No. 03-1500, opposing the display of the Ten Commandments on the grounds of the state capitol in Texas. The Committee accordingly joins in this brief in opposition to the public display of the Ten Commandments in courthouses, where citizens of many faiths and of no faith convene daily to seek justice.

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, political, and religious rights of American Jews. It has taken a particular interest in the protection of the rights guaranteed by the Establishment Clause, including all of the cases reaching this Court concerning religious displays.

The Interfaith Alliance Foundation is a unit of The Interfaith Alliance, an interfaith group of 150,000 people of faith and goodwill, from seventy different faith groups, working to promote interfaith cooperation around shared religious values and to strengthen the public's commitment to the American values of civic participation, freedom of religion, diversity, and civility in public discourse.

SUMMARY OF ARGUMENT

We incorporate by reference the brief of the Baptist Joint Committee *et al.* in *Van Orden v. Perry*, No. 03-1500. That brief argued that governments are rebuttably presumed to endorse what they display, and that when government displays a sacred text, it must rebut the presumption of endorsement by objective evidence that gives the entire display a secular meaning that dominates any religious meaning and is independent of any religious views about the sacred text. In this brief, we apply that standard to the facts of this case.

The court of appeals opinion is a straightforward application of this Court's opinion in *Stone v. Graham*, 449 U.S. 39 (1980). Neither *Stone* nor the opinion below explicitly announced a general presumption that government

endorses what it displays. But each court found it obvious on the facts before it that a bare display of the Ten Commandments endorsed the Commandments. And each court recognized the possibility that the Commandments might be integrated into a genuinely secular message. The opinion below gives meaningful content to the requirement of integration into a secular message; in the approach of this brief, the opinion below elaborates what is required to rebut the presumption that government endorses what it displays.

The court of appeals required a "demonstrated analytical or historical connection" between the Commandments and the rest of the display. *ACLU v. McCreary County*, 354 F.3d 438, 451, 453 (6th Cir. 2003). Without such a requirement, *Stone*'s requirement that the Commandments be "integrated" into a secular message would be meaningless. Government could display a sacred text and surround it with any random collection of secular documents. The United States says that a display may be "uncommonly silly or disunified" and still be constitutionally valid. U.S. *McCreary* Br. at 21 n.11. Of course governmental silliness is not unconstitutional. Governmental display of a sacred text is what establishes religion. But silliness cannot rebut the presumption of endorsement or carry the government's burden of showing that the sacred text has been integrated into a secular message.

The history of earlier displays in these counties is relevant for similar reasons. Of course the counties are free to correct earlier unconstitutional behavior. But here, the unconstitutional behavior consisted of sending a message endorsing a sacred text, and any corrective action must actually succeed in changing the message. The counties' persistent efforts to display the Ten Commandments undermines the credibility of alleged secular messages.

Here, the asserted secular message is not really secular. The counties make explicit and controversial claims about the significance of a sacred text. Government must be neutral in religious disputes, and disputes about the meaning

or significance of passages in sacred texts are squarely within that obligation of neutrality.

The counties' attempt to rationalize their display of the Ten Commandments make their endorsement more explicit and more specific. The counties' claims about the importance of the Commandments in American law and in the foundation of the country are endorsements both of the Commandments and of a particular, secularized view of the Commandments. We believe these claims are objectively inaccurate, but it is enough that they are controversial and that they concern a sacred text.

The counties' claim of legal significance for the Commandments do not focus on the Commandments against killing, stealing, and false witness, which at least correspond to elements of American law. Instead, the counties equate the Commandments with documents associated with the growth of Anglo-American liberty, and particularly assert that their influence is clearly seen in the Declaration of Independence. But the Commandments say nothing about liberty. And the Commandments' understanding of law as handed down by God is fundamentally inconsistent with the Declaration's theory that law is made with "the consent of the governed." The Commandments and the Declaration can be reconciled only by clearly distinguishing religious obligations from civil obligations -- by separating church and state.

Restricting government endorsements of religion, and requiring a clear, secular message to rebut the presumption of endorsement, is not hostile to religion. Rather, it protects each religious tradition from government-sponsored competition. When government attempts to rationalize its display of sacred texts by claiming secular purposes and secular effects, the inevitable tendency is to distort and desacralize the sacred text. Excluding the government from endorsing controversial propositions about sacred texts protects the liberty of each faith tradition to interpret its own sacred texts and to promote its own religious understandings.

ARGUMENT

I. The Counties Bear the Burden of Rebutting the Presumption That They Endorse What They Display.

We incorporate by reference the brief filed by some of these same amici in *Van Orden v. Perry*, No. 03-1500 (Brief of Baptist Joint Committee *et al.*, hereinafter cited as BJC *Van Orden* Br.). In that brief, we argued that the state is rebuttably presumed to endorse what it displays, *id.* at 3-5, and that when it displays a sacred text, it must rebut the presumption of endorsement "by objective evidence, clearly visible at the site of the display, that negates any appearance of endorsing the religious sentiment and gives the entire display a secular meaning that dominates any religious meaning." *Id.* at 30.

We argued that this standard is implicit in this Court's cases, *id.* at 4-5, and that it is necessary to prevent endless ad hoc litigation, *id.* at 5-7. We argued that in such litigation, government officials systematically attempt to desacralize sacred texts, repeatedly claiming that these sacred texts are primarily secular in purpose and effect, thus interfering with the constitutionally protected efforts of each faith group to promote its own interpretation of its own sacred texts. *Id.* at 7-10.

We argued that Texas's efforts to portray the Ten Commandments as secular were clearly insufficient to rebut the appearance of endorsement. *Id.* at 10-23. We showed that those few Commandments that are part of American law -- the Commandments against killing, stealing, and false witness -- were part of Anglo-Saxon law before the Anglo-Saxons learned of the Commandments, and that they were part of other ancient legal systems uninfluenced by the Commandments. *Id.* at 20-23.

We argued that most of the possible ways to rebut the presumption of endorsement can be specified. "A sacred text may be a necessary and integrated part of an explicit secular message that is objectively neutral with respect to the

content of the sacred text." *Id.* at 24-26. Or the government may use religious language in *de minimis* ways for secular purposes, *id.* at 26-28, as outlined by Justice O'Connor in *Elk Grove Unified School District v. Newdow*, 124 S. Ct. 2301, 2323-27 (2004). Or the government may use brief quotations from religious sources with meanings equivalent to some secular sentiment appropriate to the context where the quotation is used. BJC *Van Orden* Br. at 29-30. The Ten Commandments as displayed in this case fall in none of these categories.

We will not repeat the earlier brief here. In this brief, we apply the proposed standard to the facts of this case. The counties' efforts to evade the Establishment Clause clearly do not rebut the presumption that they endorse what they display. Instead, those efforts make the endorsement more specific and more explicit.

II. The Court of Appeals' Opinion Simply Requires the Counties to Negate the Appearance That They Endorse What They Display.

A. The Court of Appeals Properly Required a "Demonstrated Analytical or Historical Connection".

The United States vigorously attacks the court of appeals' statements that the counties' displays failed to show an "analytical or historical connection" between the Ten Commandments and the rest of the displays. Compare *ACLU v. McCreary County*, 354 F.3d 438, 451, 453 (6th Cir. 2003); with U.S. *McCreary* Br. at 19. But the court of appeals did not require such a connection in a vacuum. Having found that the counties displayed a sacred text and appeared to endorse it, the court of appeals considered what kinds of evidence might negate that appearance of endorsement.

The opinion of the court of appeals is a straightforward application of this Court's opinion in *Stone v. Graham*, 449

U.S. 39 (1980). *Stone* is consistent with an implicit presumption that government endorses what it displays, *see* BJC *Van Orden* Br. 4-5, and therefore that government bears the burden to rebut the presumption of endorsement. *Stone* acknowledges that the Commandments may be "integrated into the school curriculum," 449 U.S. at 42 (and any public school curriculum would of course have to be secular). The court of appeals properly expanded this example beyond school curricula, but it retained *Stone*'s essential requirement of "integrat[ion]" into a secular message. Thus it properly read *Stone* as holding that justification for governmental use of the Ten Commandments requires government to "present the Ten Commandments objectively and integrate them with a secular message." 354 F.3d at 448. In this brief's parallel and more explicit formulation, integration with a secular message would rebut the presumption of endorsement.

The court of appeals' requirement of "a demonstrated analytical or historical connection with the other documents," *id.* at 451, *accord* at 453, is essential if *Stone*'s requirement of integration into a secular message is not to be rendered illusory. Unless such a requirement is seriously enforced, government would be able to display any religious message it chooses merely by displaying some secular message nearby. This appears to be the position of the United States, which insists that there need be *no* connection between the sacred text and the other elements of the display: "The fact that a display is uncommonly silly or disunified does not render it an establishment of religion." U.S. *McCreary* Br. at 21 n.11; *see also id.* at 29 (claiming that a valid display may be "thematically disjointed" and "a muddle").

Of course silliness and disunity alone do not establish religion. In the secular realm for which it is responsible, government may do many silly things without violating the Constitution. It is government display of a sacred text that establishes religion. The relevance of silliness and disunity is that they do nothing to rebut the appearance that government endorses what it displays. Silliness and disunity

can not establish a clear secular message that subsumes the religious message that is explicitly displayed. Silliness and disunity in fact reinforce the presumption of endorsement; they suggest that government cared only about displaying the sacred text, and gave little thought to the rest of the display. But it is not even necessary to draw that inference. Once it is recognized that persons who post signs generally endorse the content of those signs, then a government that displays a sacred text is presumed to endorse that text, BJC *Van Orden* Br. at 3-4, and government bears the burden of rebutting that presumption. Silliness and disunity cannot carry the government's burden.

The cases on which the United States relies do not suggest that government may display unexplained and apparently unrelated conjunctions of religious and secular symbols. In *Lynch v. Donnelly*, 465 U.S. 668 (1984), it was obvious that all the symbols displayed related to Christmas as it has come to be celebrated in the United States. This relationship required no explanation, but the large "Seasons Greetings" sign clearly labeled the entire display. In *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), the decisive votes, with somewhat different emphases, plausibly interpreted the display of a Christmas tree, a menorah, and a salute to liberty sign as a tribute to religious pluralism. *See id.* at 613-21 (Blackmun, J.); *id.* at 632-37 (O'Connor, J.). Symbols of two holidays of two different religions, falling at approximately the same time, required little explanation, and the salute-to-liberty sign put the emphasis on liberty to choose among the multiple traditions represented in the display. In each case, the unifying theme was sufficiently apparent to require little explanation.

Neither *Lynch* nor *Allegheny County* suggests that a government-sponsored religious display can be constitutionally validated by unrelated or tenuously related secular displays nearby. Moreover, as explained in our earlier brief, nonverbal symbols are subject to a broader range of interpretations; government displays of sacred texts

should be held to a higher standard. *See* BJC *Van Orden* Br. at 5 n.3. *Lynch* and *Allegheny* are readily distinguished both by the inherent ambiguity of nonverbal displays and by the straightforward relationship between the religious and secular symbols displayed in those cases. Neither case approaches the facts here, in which government expressly promulgates specific religious propositions quoted from a sacred text.[2]

The other example offered by the United States is that coins do not explain the relationship between "In God We Trust" and the depictions of Monticello or Abraham Lincoln. Of course no such relationship exists to be explained; the motto on the coins is not an example of a religious text "integrated" into a secular message. The motto on the coins is an example of a completely different doctrinal category, the *de minimis* use of religious language for secular purposes, explained and developed by Justice O'Connor in *Elk Grove Unified School District v. Newdow*, 124 S. Ct. 2301, 2323-27 (2004). For the reasons explained in our

[2] The same two factors distinguish the depictions of Moses with the Commandments on two friezes of the Supreme Court building. These friezes are nonverbal displays with no visible English text of the Commandments, and Moses is grouped with other famous lawgivers, both religious and secular, including lawgivers from cultures outside the Jewish and Christian traditions. *See* Office of the Curator, Supreme Court of the United States, *Courtroom Friezes: North and South Walls*, at www.supremecourtus.gov/about/north&southwalls.pdf; Office of the Curator, Supreme Court of the United States, *The East Pediment*, at www.supremecourtus.gov/about/eastpediment.pdf. The Court could not plausibly be thought to endorse each of the great variety of legal codes symbolized in these friezes. Indeed, some of these codes, such as those of Draco and Lycurgus, were harsh, authoritarian, and repugnant to American sensibilities. In context, the friezes are an artistic and architectural means of symbolizing law and the role of this Court, with no implied endorsement of all that is depicted. And unlike the displays at issue here, the friezes make no specific claims about the meaning or significance of the Commandments.

earlier brief, the Ten Commandments clearly do not fit in that category. BJC *Van Orden* Br. at 26-28.[3]

B. The Court of Appeals Properly Relied on the Counties' Earlier Displays.

Petitioners and the United States also complain of the court of appeals' reliance on the history of earlier displays of the Ten Commandments at the same sites. *ACLU v. McCreary County*, 354 F.3d 438, 455-58, 461 (6th Cir. 2003). These parts of the opinion were entirely proper, with or without a presumption that the counties endorse what they display. But such a presumption would further strengthen and explain these parts of the opinion.

The counties began with bare displays of one version of the Ten Commandments on their courthouse walls. *Id.* at 441-42. After the counties were sued, they added excerpts from various patriotic documents. *Id.* at 442. After those displays were enjoined, the counties modified the mix of patriotic documents, displayed entire documents rather than excerpts, and added attempts to explain how the Ten Commandments related to these other documents.

The original bare displays of the Ten Commandments obviously endorsed the Commandments; there is no basis, however strained or attenuated, to argue for any other interpretation. This bare endorsement is what the counties displayed when they thought they were free to say what they really thought; all subsequent additions to these displays were in response to litigation. A reasonable observer watching these incremental additions would see the counties scrambling to preserve their endorsement of the Commandments, searching for the minimum amount of secular content and secular rationalization to preserve the displays. The reasonable observer "must be deemed aware of the history and context of the community and forum in which the religious display appears." *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring). Here that history was entirely public and recent, and its one continuous feature was the counties' persistent effort to display the Ten Commandments.

This history inevitably makes it more difficult for the counties to rebut the presumption that they endorse what they display. They must integrate the Commandments into a clear and explicit secular message, but the history of what they have displayed undermines the credibility of any secular additions to the message.

Of course a county that violates the Constitution is permitted to make corrections and comply with the Constitution thereafter. But the "corrections" must actually correct the violation. Where the violation consists of sending a message, corrections must actually change the message, and sometimes, that may be difficult. Here, the publicly known history of the counties' efforts to endorse the Commandments continues to be part of the message. Negating that endorsement requires a clean break, an unambiguously secular message, and an unambiguously secular integration of any religious material included in that

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[3] Petitioners' discussion of Justice O'Connor's test in *Newdow*, Pet. Br. 40-47, is not recognizable as the same test. Instead of asking whether a particular practice has a long and ubiquitous history, petitioners would ask "whether history reveals that a practice has established or tended to establish a religion." *Id.* at 42. Petitioners expressly reject the factor of absence of worship or prayer. *Id.* at 43-44. They interpret "absence of reference to particular religion" to permit quotation from a particular religion's sacred texts. *Id.* at 45. They interpret "minimal religious content" to mean only that the words "God" and "Lord" must be surrounded by a much larger number of other words. *Id.* at 45. They thus fail to count most of the religious content, and they would apparently permit any absolute amount of religious content so long as it were surrounded with a larger amount of secular content.

The strength of Justice O'Connor's proposed test is to define a relatively objective boundary to a permissible category of *de minimis* uses of religious language. The test will quickly become useless if its factors are expanded and manipulated.

message. As explained below, the counties have not come close to negating their religious message. But if this case were closer -- if the new displays made a better pretense of integrating the Commandments into a secular message -- the message sent to the reasonable observer would necessarily have to be understood in light of the history of these displays and the counties' persistent efforts to endorse the Commandments.

Disregarding the history of these displays is also a formula for endless litigation. The counties can endlessly tweak their displays, claiming that every addition presents a whole new case or controversy that renders all prior versions of the displays irrelevant. This Court has rejected a similar litigation strategy before, in a similar context. *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 313-17 (2000). Governments cannot be allowed to perpetuate unconstitutional religious displays by repeatedly changing them to avoid final judgment.

C. Requiring a Clear Secular Message Is Not Hostile to Religion.

Requiring government to clearly communicate an explicit secular message does not treat religious symbols "as so inherently suspect as to require some sort of curative instruction." *See* U.S. *McCreary* Br. at 19. Religious symbols are not suspect; what is suspect is *government* display of religious symbols, and especially government display of sacred texts. What is required is not "a curative instruction," but a secular message that is independent of any religious view about the sacred text.

Necessarily, government must state that secular message clearly and explicitly. It has clearly and explicitly displayed the sacred text; the appearance of endorsement is clear, and to negate that appearance, the secular message must predominate. For the secular message to predominate, it must also be clear and explicit. The court of appeals properly required the counties to show that they had so

integrated the Commandments into a secular message that the resulting integrated message negated the appearance that the counties endorsed the Commandments themselves.

III. The Counties' Exaggerated Claims About the Legal Significance of the Commandments Endorse the Commandments and One Disputed View of the Commandments.

The counties cannot rebut the presumption that they endorse what they display simply by surrounding a sacred text with a miscellaneous selection of secular documents. Such a display might simply endorse all its disparate elements, or it might be gerrymandered to include a marginally relevant sacred text, or its message might depend on an essentially religious claim about the truth or significance of the sacred text. *See* BJC *Van Orden* Br. at 25-26. All these things appear to be true of the displays at issue here.

The Ten Commandments are the only religious document in displays of patriotic documents; the Commandments do not fit in any reasonable category with the remainder of the display. Such gerrymandering shows that the counties were determined to include the Commandments whether or not they were reasonably necessary or clearly relevant to the rest of the display. Such determination to include the Commandments despite their marginal relevance demonstrates a purpose to endorse the Commandments and has the effect of endorsing the Commandments. Such a gerrymandered display conveys no secular message to which the Commandments are an integral part, so it cannot rebut the presumption that the counties endorse the sacred text that they display.

More fundamentally, the counties' displays do not clearly communicate any secular message that is independent of religious beliefs about the Commandments. In their efforts to rationalize inclusion of the Commandments, the counties explicitly endorse both the Commandments and a particular

secularized view of the Commandments. The displays claim that:

> The Ten Commandments have *profoundly* influenced the formation of Western legal thought and the formation of our country. That influence is *clearly* seen in the Declaration of Independence, which declared that, 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.' The Ten Commandments provide *the* moral background of the Declaration of Independence and *the foundation* of our legal tradition.

354 F.3d at 351 (emphasis added). All that petitioners can now bring themselves to say about the most specific portion of this remarkable claim is that some of the Commandments "*are compatible with* the rights to life, liberty and happiness." Pet. Br. 10 n.7 (emphasis added). Petitioners insist that the counties' claims "need not be accurate." *Id.* at 10. The United States suggests a similar disdain for any requirement of accuracy when it suggests that a government display that validly includes a sacred text may be "uncommonly silly." U.S. *McCreary* Br. at 21 n.11.

As further explained below, we believe the counties' claims are wildly inaccurate. We think that no religiously neutral reasonable observer would accept the counties' view of the Commandments -- that only a prior commitment to rationalizing government display of the Commandments would induce any observer to take the counties' claims seriously. But accurate or not, the more fundamental point is that the counties' claims are *about the meaning and significance of a sacred text* and that the claims made about that sacred text are *controversial*. Just as government cannot take sides in controversies about religious faith, so it cannot

take sides in controversies about the significance or consequences of sacred texts.

Government discussions of religion must be religiously neutral, and in general, that will mean that government must confine itself to objective facts, readily verified. When government makes evaluative claims about a particular sacred text, it is taking sides in a religious controversy. That many observers find the counties' claims to be inaccurate is evidentiary of the more fundamental point that the counties' claims are at best highly debatable. The counties may of course make controversial statements, and even inaccurate statements, about secular matters within their responsibility. But they may not make controversial statements about a sacred text, because they may not take sides in religious debates.

When government claims that a particular sacred text is "the foundation of our legal tradition," it is endorsing that sacred text as especially important. And it is endorsing a particular view of that text, emphasizing its legal significance rather than its religious significance. The courts below thus got it exactly right when they said that the counties' efforts to rationalize and secularize their displays of the Commandments were in fact endorsements of the Commandments:

> The reasonable observer will see one religious code placed alongside eight political or patriotic documents, and will understand that the counties promote that one religious code as being on a par with our nation's most cherished secular symbols and documents. This is endorsement.

ACLU v. McCreary County, 354 F.3d at 458, quoting *ACLU v. McCreary County*, 145 F. Supp. 2d 845, 851 (E.D. Ky. 2001).

We are not proposing either a heckler's veto or a presumption against any government statement that might in

any way reflect on religion. If the county museum explains that black churches played an important role in the civil rights movement, it is not enough that someone, somewhere might be found who disagrees with that statement. Such a statement would be readily verifiable by evidence that is ample, recent, and secular; it would principally be a statement about the political activities of identifiable individuals and groups of people; and most obviously, it would not be a statement about a sacred text. Where there is substantial and legitimate controversy about a sacred text, government should remain neutral.

Here, the counties make explicit claims about a particular sacred text, and the very best that can be said for those claims is that there is substantial and legitimate controversy about them. We believe that the counties' claims are grossly inaccurate and created for purposes of litigation. In our earlier brief, we addressed the claim that the Ten Commandments played a significant role in the development of American law, characterizing that claim as "wrap[ping] a kernel of truth in such a vast overstatement as to demonstrate that the statement is a pretext to justify displaying the Commandments." BJC *Van Orden* Br. at 20. What the counties claim here is even less plausible than what Texas claims.

The three Commandments that are reflected in modern American law are the Commandments against killing, stealing, and bearing false witness. *See id.* These appear in the criminal code, and in the common law tort of defamation; they do not appear in any of the nine secular documents included in the counties' displays. Thus the one plausible claim of legal significance for the Ten Commandments, as attenuated as it is, is not part of the counties' displays and has no relation to their displays.

The counties categorize the Ten Commandments not with bans on murder, theft, and perjury, but with documents associated with the rise of liberty: the Magna Carta, the Bill of Rights, the Declaration of Independence, and the

Preamble to the Kentucky Constitution. But nothing in the Commandments says anything about liberty.

Even more implausible is the counties' claim that the Commandments's profound influence on western legal though is "clearly seen in the Declaration of Independence." *If* the Commandments are conceived of as law,[4] then the Commandments and the Declaration reflect very different views of the sources and nature of law. In the Commandments, the authority of law comes down from above: law is dictated by God. But in the Declaration, the authority of law comes up from below: laws are made by governments "deriving their just powers from the consent of the governed." To claim that the Declaration shows the profound influence of the Commandments is to fundamentally distort both.

Of course millions of Americans revere both the Declaration and the Commandments, but not because one shows any influence of the other. Believing Americans can reconcile these documents by clearly distinguishing religious obligations from civil obligations -- *i.e.*, by separating church and state. The Commandments are religious obligations (or even, in some understandings, *religious law*), binding on the conscience of believers, and in the belief of many Christians and Jews, binding simply because God so commanded. But in the United States, the Commandments are no part of the law enacted by government, no part of the law enforceable by government, and of course, in no way binding on any persons who do not voluntarily accept their religious authority. The only law that is binding on all in the United States is law made by the consent of the governed

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[4] The Commandments were law when handed down, in an ancient Jewish society that had little or no concept of separation of church and state and did not distinguish religious from secular law. The Commandments are often referred to as part of "the law" even today in the Jewish tradition, but it is clear that this usage means religious law, not civil or secular law.

under constitutional processes operating through democratic institutions.

Recognizing and preserving this distinction between religious and civil obligations is not hostile to religion. Rather, it protects each religious tradition, and each American, from government-sponsored religious competition. These amici and their members have religious views about the Ten Commandments, and for the most part, these religious views are not the stated views of the counties. For amici's Christian and Jewish members, the Commandments are of profound religious importance, and emphasizing their attenuated connection to American law misses the fundamental point and distorts their religious significance. Persons of other faiths who are members of The Interfaith Alliance have a variety of views about the Ten Commandments. Members of The Interfaith Alliance are respectful of other religious traditions, but few find it plausible to believe that a particular sacred text of someone else's religion is the foundation of their nation's legal system.

When government displays a sacred text without note or comment, it endorses and supports that text and the religious traditions to which the text is sacred. When government tries to justify itself by explaining the significance of the sacred text, it takes sides in any controversies about the meaning and significance of the sacred text. Because government can display sacred texts only if it claims a secular purpose and effect, the tendency of its explanations is always to distort and desacralize the sacred text. The inevitable effect is that government supports only the religion of those who agree with both the sacred text and the government's secularized explanation of the text. Government puts itself in competition with the religion of all other Americans. Our Constitution excludes government from such religious competition -- for the protection of believers and nonbelievers alike.

CONCLUSION

The judgment should be affirmed. The opinion should make clear that government is presumed to endorse what it displays, and that when it displays a sacred text, government must clearly rebut the presumption of endorsement.

Respectfully submitted,

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